

STATE OF MICHIGAN  
COURT OF APPEALS

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DIETRICH & ASSOCIATES,

Plaintiff-Appellant,

v

CAROLYN ROGERS, GEOFFREY FIEGER, and  
FIEGER, FIEGER, KENNEY & JOHNSON, P.C.,

Defendants-Appellees.

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UNPUBLISHED

January 27, 2005

No. 250702

Oakland Circuit Court

LC No. 03-049879-CK

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing its complaint. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff first argues that the trial court failed to recognize that its suit seeking payment of attorney fees properly stated an "independent action" under the five-part test of *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 588-589; 644 NW2d 54 (2002). We disagree. The portion of *Trost* relied on by plaintiff is inapposite to the present case because its five-part test is directed at when a party may obtain equitable relief in an independent action from a judgment that has been entered against it. The *Trost* test applies to circumstances in which a judgment has been entered against a party in the sense of imposing liability on that party in favor of another party. In particular, one requirement of the five-part test is a showing that there is a valid defense to the alleged cause of action on which the judgment is founded. *Id.* at 589. In this case, plaintiff is not attempting to obtain such relief from a judgment imposing liability on it, but rather is seeking to affirmatively impose liability on defendants. Thus, the five-part test of *Trost* pertaining to equitable relief from a judgment is inapplicable, and plaintiff is not entitled to relief on this basis.

Plaintiff next argues that the trial court erred in granting summary disposition to defendants without conducting an evidentiary hearing because of its allegations of fraud. We disagree. The authority cited by plaintiff indicates that it is generally an abuse of discretion for a trial court to decide a motion for relief from a judgment or an order based on fraud without conducting an evidentiary hearing. *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995). But, in dismissing plaintiff's case, the trial court was not deciding a motion for relief from a judgment or an order. Rather, it resolved defendants' motion to dismiss the case. Thus, the authority relied on by plaintiff does not indicate that the trial court was required to hold an

evidentiary hearing on the matter. Further, the motion to dismiss was predicated on plaintiff's claims being barred by the doctrine of res judicata. Accordingly, the motion presented a legal issue as to which an evidentiary hearing was unnecessary. Therefore, plaintiff is not entitled to relief based on this issue.

Finally, plaintiff argues that the trial court erred by dismissing this case on the basis of res judicata because the case involved an "independent action," named defendant Carolyn Rogers as a defendant (unlike the prior Wayne Circuit Court action), and involved different allegations than the prior litigation. We disagree. Whether res judicata bars a subsequent action is reviewed de novo. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The doctrine of res judicata bars a subsequent action when (1) a prior action was decided on the merits, (2) both actions involve "the same parties or their privies," and (3) the matter in the second action was or could have been resolved in the first. *Id.* at 121. Michigan law applies res judicata broadly to bar "not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.* Clearly, the prior Wayne Circuit Court action in which defendants Fieger and his law firm obtained a grant of summary disposition in their favor was decided on the merits and involved the same matter as the present case. Moreover, plaintiff's substantive claims in this case were, or with reasonable diligence, could have been raised in the earlier case. Accordingly, res judicata bars plaintiff's claims against Fieger and his law firm.<sup>1</sup>

The only remaining question is whether defendant Rogers is also protected from the present suit by the doctrine of res judicata based on privity with Fieger and his law firm. Parties are in privity for this purpose if "the first litigant represents the same legal right that the later litigant is trying to assert." *Id.* at 122. In naming Rogers as a defendant, plaintiff must be claiming that it is entitled to recover a portion of its claimed attorney fee from her. In this regard, Fieger and his law firm effectively represented Carolyn's "legal right" in opposing plaintiff's claim of an entitlement to such an attorney fee in the earlier action. Accordingly, Carolyn is in privity with Fieger and his law firm for purposes of this case and, thus, is also protected against plaintiff's claims by the doctrine of res judicata. The trial court properly dismissed the case on the basis of res judicata.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Mark J. Cavanagh  
/s/ Stephen L. Borrello

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<sup>1</sup> Although the Fieger law firm has a different name in this case than in the prior action, it is apparent that, even if they are two distinct entities, they are in privity for purposes of this action because plaintiff's claim against the current Fieger law firm must be based on it being responsible for the conduct of the earlier law firm.